Loudon Steel, Inc. *and* Sheet Metal Workers International Association, Local 7, AFL–CIO. Cases 7–CA–44080–1, 7–CA–44080–2, and 7–CA–44270

September 26, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 12, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions. The General Counsel filed a motion to strike the Respondent's exceptions, an answering brief to the Respondent's exceptions, and conditional cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Loudon Steel, Inc., violated Section 8(a)(1) of the Act by

a. Coercively interrogating employees about their union activities or sympathies;

b. Telling employees orally and in writing to report harassment by union adherents to management;

c. Telling Daniel Hurren that he could only speak to other employees at breaks, lunch, and before and after work;

d. Threatening to place Daniel Hurren's union activities under surveillance and doing so;

e. Threatening Daniel Hurren with physical harm and property damage;

f. Threatening Daniel Hurren with discharge if he failed to achieve an unrealistic production quota;

g. Engaging in surveillance of employees' union activities by approaching their vehicles as the Union attempted to distribute handbills; and

h. Promulgating and maintaining a no-solicitation rule that is overbroad.

Respondent violated Section 8(a)(3) and (1) of the Act by

i. Laying off Donald Davis on May 31, 2001, and failing to recall him;

j. Creating an unrealistic production quota for Daniel Hurren and imposing this unrealistic production quota on him on May 29, 2001; and

[1] The General Counsel moves to strike the Respondent's exceptions on the ground that they do not satisfy Sec. 102.46(b)(1) of the Board's Rules and Regulations. The exceptions do, however, cite transcript testimony, record exhibits, and pages of the judge's decision. In these circumstances, we deny the General Counsel's motion because the Respondent's exceptions substantially, if not fully, comply with the Board's requirements. *Brown & Root U.S.A., Inc.*, 319 NLRB 1009 fn. 1 (1995); *Days Hotel of Southfield*, 311 NLRB 856 fn. 2 (1993); *United Merchants Mfrs.* 284 NLRB 135 fn. 1 (1987), denied enf. on other grounds, *Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC v. NLRB*, No. 87-2649 (4th Cir. 1988) (unpublished).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent unlawfully interrogated employee Daniel Hurren about his union activity. No exceptions were filed to this finding. We agree with the judge that the Respondent unlawfully interrogated employee Donald Davis regarding his union sympathies when the Respondent's foreman, Aaron Burrows, asked Davis to sign an antiunion petition. In view of these findings, we find it unnecessary to pass on the judge's additional finding that the Respondent's second shift supervisor Emory Close also unlawfully interrogated employee Davis when Close asked Davis if Davis and Hurren were friends. Any violation in this regard would be cumulative and would not affect the remedy or Order.

[3] The General Counsel noted in conditional cross-exceptions that the judge failed to conform the recommended Order and notice with the conclusions of law. The judge found that the Respondent violated Sec. 8(a)(1) of the Act by promulgating and maintaining a no-solicitation rule that is overly broad. However, the judge failed to include the requisite provisions in his recommended Order and notice. We grant the General Counsel's conditional cross-exceptions in this respect and shall appropriately modify the recommended Order and notice.

We also note that, although the judge found that the Respondent violated Sec. 8(a)(1) of the Act by telling employees orally and in writing to report harassment by union adherents to management, he failed to provide in his recommended Order that the Respondent shall cease and desist from such conduct. Accordingly, we shall modify the recommended Order in this regard.

We also find merit in the General Counsel's conditional cross-exceptions and find that the Respondent violated Sec. 8(a)(1) of the Act by threatening to discharge employee Daniel Hurren if he did not meet an unrealistic production quota, and Sec. 8(a)(3) and (1) of the Act by imposing the unrealistic production quota on Hurren. In so finding, we note that these violations are alleged in the complaint and were fully litigated. These findings support the judge's conclusion that the Respondent constructively discharged Hurren in violation of Sec. 8(a)(3) and (1) of the Act. See *Bolivar Tee's Mfg. Co.*, 334 NLRB 1145, 1157–1158 (2001), enfd. *Bolivar Tee's Mfg. Co. v. NLRB*, No. 01–1478 (D.C. Cir. 2003)(unpublished). Accordingly, we shall modify the judge's recommended Order and notice to reflect these additional violations.

Finally, the Respondent has filed no exceptions to the judge's grant of a broad order. In these circumstances, and on this record, we shall grant that order.

k. Constructively discharging Daniel Hurren on May 29, 2001.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent Loudon Steel, Inc., Millington, Michigan, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Coercively interrogating employees about their union activities or sympathies.

(b) Telling employees orally and in writing to report harassment by union adherents to management.

(c) Telling employees that they can only speak to other employees at breaks, lunch, and before and after work.

(d) Threatening to place employees' union activities under surveillance and doing so.

(e) Threatening employees with physical harm and/or property damage.

(f) Threatening employees with discharge if they failed to achieve an unrealistic production quota.

(g) Engaging in surveillance of employees' union activities by approaching their vehicles as the Union attempted to distribute handbills.

(h) Promulgating and maintaining a no-solicitation rule that is overbroad.

(i) Laying off and failing to recall employees because they engage in union activities.

(j) Creating unrealistic production quotas for employees and imposing these unrealistic production quotas on employees because they engage in union activities.

(k) Constructively discharging employees because they engage in union activities.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Daniel Hurren and Donald Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Daniel Hurren and Donald Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Daniel Hurren and unlawful layoff of Donald Davis, and within 3 days thereafter notify them in writing that this has been done and that Daniel Hurren's discharge and Donald Davis' layoff will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Millington, Michigan facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 29, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 26, 2003

Robert J. Battista, Chairman

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate employees about their union activities or sympathies.

WE WILL NOT tell employees orally and in writing to report harassment by union adherents to management.

WE WILL NOT tell employees that they can only speak to other employees at breaks, lunch, and before and after work.

WE WILL NOT threaten employees with physical harm and/or property damage.

WE WILL NOT threaten employees with discharge if they fail to achieve an unrealistic production quota.

WE WILL NOT engage in surveillance of employees' union activities by approaching their vehicles as the Union attempted to distribute handbills.

WE WILL NOT promulgate and maintain a no-solicitation rule that is overbroad.

WE WILL NOT lay off and fail to recall employees because they engage in union activities.

WE WILL NOT create unrealistic production quotas for employees and impose these unrealistic production quotas on employees because they engage in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Daniel Hurren and Donald Davis full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Daniel Hurren and Donald Davis whole for any loss of earnings and other benefits resulting from their discharge and layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Daniel Hurren and the unlawful layoff of Donald Davis, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge and lay-off will not be used against them in any way.

LOUDON STEEL, INC.

Patricia Fedewa, Esq., for the General Counsel.
William R. Leser, Esq. (Lambert, Leser, Cook, Giunti & Smith, P.C.), of Bay City, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried before the late Judge Jerry M. Hermele in Flint, Michigan, on October 23, 2001. Since Judge Hermele had not issued a decision in this case prior to his untimely death, Chief Administrative Law Judge Robert A. Giannasi reassigned the case to me on March 1, 2002, pursuant to Section 102.36 of the Board's Rules and Regulations. As the parties have agreed not to try the case de novo, I am issuing this decision based on the record made before Judge Hermele and the briefs filed by the General Counsel and Respondent. The charges in these cases were filed on June 1, June 11, 2001 and August 8, 2001, and the complaint was issued August 9, 2001, and amended on October 3, 2001.

The General Counsel alleges that Respondent, Loudon Steel, Inc., committed a number of 8(a)(1) violations immediately upon learning of an organizing drive by the Union, Sheet Metal Workers International Association, Local 7. It also alleges that Respondent violated Section 8(a)(3) and (1) in constructively discharging Daniel Hurren and laying off Donald Davis.

FINDINGS OF FACT

I. JURISDICTION

Respondent, Loudon Steel, Inc., a corporation, manufactures shipping containers for the automotive industry at its facility in Millington, Michigan, where it annually earns gross revenue in excess of $500,000 and sells and ships goods valued in excess of $50,000 to points outside of the State of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Sheet Metal Workers International

Association, Local 7, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The events of May 29, 2001

On May 29, 2001, at about 2 p.m., Matthew Gekeler, an organizer for the Union, hand-delivered a letter to Respondent informing Loudon Steel that Daniel Hurren was a volunteer organizer for Local 7. Gekeler informed the police that the Union would be passing out handbills at Respondent's plant and then went with other union members to a pizza parlor. Gerry "Gib" Loudon, Respondent's vice president and plant manager, went to this restaurant to talk to Gekeler. Gekeler informed him verbally that Daniel Hurren was a volunteer union organizer.

Later, when the union representatives parked and prepared to distribute their handbills, Gib Loudon and Emory Close, Respondent's second shift supervisor, asked them to move. A police officer named Davenport, whose son works for Respondent, informed the union representatives that they were trespassing on Respondent's property and would have to move; the union representatives left.

Daniel Hurren reported for work on time for his shift that began at 4 p.m. Foremen Al Volino and Larry Detgen took Hurren to a work location where Hurren was to perform his usual task in assembling part of the shipping containers. However, on May 29, Emory Close, who was already aware that Hurren was a volunteer union organizer, came over to Hurren's work station and told Volino and Detgen to assign another employee to Hurren's job. Close instructed Hurren to walk outside the building, where he told him that he knew Hurren was a union organizer and that the only time he was to talk to employees was on breaks, at lunch, and after work. I find for reasons more fully discussed below that Close also threatened Hurren with physical harm and suggested that his vehicle might be vandalized due to his union activities.[1]

Close assigned Hurren to produce side plates.[2] This was the first time Close had ever personally assigned work to Hurren. Close instructed Hurren to produce 80 parts in his scheduled 10-hour shift. He told Hurren that he would be terminated if he did not produce that many parts. An employee doing the same task on the first shift produced 30 parts in an 8-hour shift. Close told Detgen to stay away from Hurren and told welding foreman Jason Enos to let Close know if he saw anyone talking to Hurren. A few hours later, Hurren punched out on Respondent's time clock and left the plant.[3]

The events of May 31, 2001

The Union returned to Respondent's plant on the afternoon of March 31, to hand out flyers. Several management representatives, including Gib Loudon and Emory Close, stood in the company's parking lot, while union representatives attempted to pass out the handbills. Local policemen were also present. As employees drove up to the entrance where the handbillers were standing, Emory Close approached 8–10 of their cars, coming as close as 2–3 feet to the vehicles.

Gib Loudon called all second shift employees into the lunchroom at the beginning of the shift and distributed and read to them a 4-page memorandum from his brother, Gregg Loudon, Respondent's President. The memo generally advised employees why Respondent thought it was not in their best interests to join the Union. Additionally, at the bottom of the third page, the memo stated

> Fact: The company also will not condone harassment or undue pressure on any of you. If you receive any threats or do not want to be harassed, please let us know and the Company will see that it is stopped. Remember, it is illegal for a union to restrain or coerce anyone in the exercise of their right *not to join* a union or sign a union card.

GC Exh. 11.

After the second shift lunchbreak, Emory Close approached Donald Davis and moved him from the welding shop to the laborer's shop. Close asked Davis if Davis and Daniel Hurren were friends. Davis replied, "I guess so." Close started talking about the Union with Davis. Davis mentioned that there had been a union meeting in Frankenmuth, Michigan, the prior Friday, but that Davis did not attend.[4]

Davis went to work drilling tubes. While he was working, Aaron Burrows, the foreman or team leader in the laborer's shop, drove up in a 'hi-low" vehicle. On the back of the vehicle was a 4 x 8 piece of plywood, which proclaimed, "we don't want your union" and contained the signatures of employees. Burrows asked Davis to sign the plywood and Davis refused. Burrows said, "don't worry about it if you don't sign it, you won't get laid off or fired." Davis replied that he wasn't going to worry about it and that Burrows should "get out of my face." Burrows drove off. In part because the entire plant is visible from a window in Emory Close's office, I infer that he was aware of Burrows' solicitation of employees to sign the placard.

As Davis was punching out to leave the plant a few hours later, Emory Close approached him and employee Jason Fox and informed them that they were being laid off.[5] Close also

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[1] Hurren and Close had just walked back into the plant when Close made this threat. They then went back outside where Close said it was too bad Hurren didn't have any witnesses. Later in the evening, Close stopped by Hurren's workstation and said cars like Hurren's get vandalized all the time.

[2] The side plates are parts that are incorporated into the shipping containers.

[3] I credit the testimony of Larry Detgen as to the production quota imposed on Hurren and the number of parts produced on the first shift. So far as this record stands, Detgen is a neutral witness and Respondent made no attempt to attack his credibility. Detgen's testimony at Tr. 151 stands for the proposition that there were production records that indicated the number of side plates produced on the first shift on May 29. Respondent offered no testimony that such records did not exist.

Close did not contradict Hurren's testimony that he threatened to terminate Hurren if he did not meet his production quota.

[4] Although Davis did not testify that Close asked him about union meetings, I infer that this is the case. There would be no reason for Davis to mention the meeting without prompting from Close.

[5] Close also testified that he laid off a long-time employee named Wright. I decline to either credit or discredit this testimony. I note that the only Wright working for Respondent in May was Robert J. Wright,

told them that they would be recalled soon. Davis, who began working with Respondent in June 1993 was one of the most senior welders in the plant. He had never been involuntarily laid off prior to May 31, 2001. Indeed, in February 2001, when some second shift employees were laid off, Davis was allowed to transfer temporarily to the first shift for a few weeks.

Fox was recalled at some unspecified time in the summer of 2001. Davis was never recalled and Respondent has hired a number of employees, including welders and jig builders since Davis was laid off.[6] Respondent rehired an employee named Mark Evans on June 6, 2001.[7] Respondent has offered no explanation for its failure to recall Davis. Moreover, the only explanation Close offered for selecting Davis for lay-off is, "Don always wanted to take a day off now and then and it was more than I thought and this was the result."

In addition to implicitly indicating support for the Union by refusing to sign the anti-union placard on May 31, Davis had signed an authorization card for the Teamsters Union in April and May 2001 and talked to other employees on behalf of the Teamsters. He had discussed joining the Sheetmetal Workers Union with Hurren sometime later. He also attended a meeting at employee Larry Detgen's house to discuss organizing a union at Loudon Steel sometime in the spring of 2001. A few days after May 31, Close told Detgen that he had heard something about Detgen, Donald Davis, and Daniel Hurren getting together for a union meeting at a bar.

ANALYSIS

On May 31, 2001, Respondent violated the Act in coercively interrogating Donald Davis regarding his union sympathies (complaint pars. 14 and 15).

Whether an employer's questioning of an employee about union activities violates Section 8(a)(1) of the Act depends on the circumstances surrounding the questioning, *Westwood Health Care Center*, 330 NLRB 935 (2000); *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. 760 F. 2d 1006 (9th Cir. 1985). In this case, Emory Close's questioning of Donald Davis was coercive. Close approached Davis immediately after employees had a meeting with Gib Loudon, who read a statement demonstrating Respondent's hostility towards the Union.

Close immediately asked Davis whether he was a friend of Daniel Hurren, known by both of them to be a leader of the organization drive within the plant. Close's question in this context could only have been posed in order to determine Davis' sympathy for the Union. Just to insure that Davis didn't miss the point, Close then engaged him in conversation about the Union.

Soon afterwards, Aaron Burrows, a team leader/foreman, asked Davis to sign an anti-union placard. I need not decide whether Burrows was a statutory supervisor, because he was clearly an agent of Respondent. Burrows has the authority to assign work to employees and to issue written discipline to employees, with the approval of Emory Close. A person is an agent under Board law if employees would reasonably believe that the individual was reflecting company policy and speaking and acting for management, *Community Cash Stores*, 238 NLRB 265 (1978). This was certainly true for Burrows.

Additionally, I infer that Close, whose office overlooks the entire plant was aware that Burrows was riding around in a high-low during work time soliciting signatures for an anti-union petition. I infer he also learned who signed the petition and who did not. When an agent of the employer, such as Burrows, solicits employees for an indication of opposition to the Union, the agent is obviously interrogating the employee about his or her union sympathies. Moreover, that interrogation is inherently coercive. The Board has long and consistently held that an employer may not put employees in a position in which they reasonably would feel pressured to make an observable choice that demonstrates their support for, or opposition to the union, *Kurz Kasch, Inc*., 239 NLRB 1044 (1978); *Allegheny Ludlum Corp*., 333 NLRB 734, 740 (2001).

Respondent Violated Section 8(a)(3) and (1) of the Act in Laying Off Donald Davis (complaint paragraph 16)

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[8] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

Donald Davis engaged in union activity by discussing organizing a union and meeting with other employees for this purpose. Respondent, as evidenced by Emory Close's remarks to Davis and to Larry Detgen after Davis' lay-off, knew of, or suspected, that Davis was engaging in union activity. Moreover, Davis' refusal to sign the anti-union placard was activity protected by the Act of which Respondent was aware through its agent, Aaron Burrows, and I infer, through Close.

Animus

There is a great deal of evidence of animus toward union activity on the part of management, including Emory Close's surveillance of employees on May 31, the solicitation of employees to report union activity to management, Close's interrogation of Davis regarding his union activities and his interrogation of Davis with regard to his friendship with Hurren. In-

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who was hired on September 5, 1998. Assuming that this is the same "Joe Wright" referred to elsewhere in the transcript, a leadman or instructor for welders, this individual was working for Respondent in September and October 2001 (Exh. R-1).

[6] Davis built jigs (a big table on which the shipping containers are constructed) as well as welded.

[7] The record does not indicate the position for which Evans was hired or how he compared to Davis in seniority.

[8] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

deed, there is no innocent or nondiscriminatory explanation for Close's inquiry to Davis about whether or not he was a friend of Hurren.

Discriminatory motive

> Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge.

W.F. Bolin Co. v. NLRB, 70 F. 3d 863, 871 (6th Cir. 1995).

In the case of the Davis lay-off, the timing of the lay-off suggests discrimination in the absence of any credible nondiscriminatory explanation of why Davis was laid-off instead of less senior employees. In this regard I find Close's explanation that Davis took off too many days to be incredible particularly in the absence of any corroborative proof and any evidence that management ever advised or disciplined Davis for excessive absenteeism. Indeed, Close admitted that overall Davis was a very good employee.[9] Likewise, there is no credible explanation for why the other employees laid off were recalled and Davis was not. I find Respondent's explanation for Davis' selection to be purely pretextual.

Findings of anti-union animus and discriminatory motive may also be predicated on the pretextual reasons advanced for a personnel action. It is well settled that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal, *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897,898 (1988), *Shattuck Denn Mining Corp.*, 362 F. 2d 466, 470 (9th Cir. 1966).

Indeed, in a case arising under the age discrimination in Employment Act, the Supreme Court reiterated the probative value of an employer's pretextual reasons for a personnel action in proving discrimination.

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 at 2108 (2000).

Respondent Constructively Discharged Daniel Hurren on May 29, 2001; Credibility Resolutions

Each of the alleged violations in this case must be established independently and Respondent's defense to each alleged violation must also be analyzed independently. However, in analyzing each allegation, the entire context of the situation must be considered. This includes other established unfair labor practices, which are highly relevant in determining Respondent's motive—particularly, as in this case, where they establish extreme hostility to unionization and employees' efforts to organize, *NLRB v. DBM, Inc.*, 987 F.2d 540 (8th Cir. 1993); *Reeves Distribution Services*, 223 NLRB 995, 998 (1976).

In Daniel Hurren's case, Respondent concedes that he engaged in union activity and that it knew that he was the principal in-house organizer. To determine whether the General Counsel has proved animus and discriminatory motivation, I must resolve the conflicting testimony of Emory Close and Jason Enos, on the one hand, and Daniel Hurren, on the other.

In light of the facts surrounding the lay-off of Donald Davis, I credit Hurren's account of his May 29 conversation and find that Close threatened him physically and implied that his vehicle might be vandalized. The fact that Respondent was willing to select a senior employee such as Davis for lay-off without any colorable nondiscriminatory explanation leads me to the inference that it harbored an extreme degree of anti-union animus. There is also no satisfactory explanation for Close's decision, shortly after learning of Hurren's union activity, to remove him from his regular task and invite him outside the plant for a private conversation.[10]

Under Board law, the test for determining whether an employer caused the resignation of, or constructively discharged, an employee, is as follows

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976).

I find that as a matter law, Respondent constructively discharged Daniel Hurren. Emory Close's threats of physical harm and vandalism to Hurren's property, as well as Close's threat to terminate Hurren if he did not meet an unrealistic production quota, created working conditions sufficiently difficult and unpleasant so as to force Hurren to resign.

I also credit Daniel Hurren's testimony that he did not say that he was quitting on May 29, because employees would not sign union authorization cards or anything similar. I discredit the contrary testimony of Emory Close and Jason Enos. Due to the pretextual nature of Close's explanation for laying-off Davis, I consider Close an unreliable witness. Moreover, I

[9] Indeed, Close initially testified that he thought Davis still worked for Respondent (Tr. 35).

[10] The plant was noisy, but Close was able to communicate with others inside the building.

deem it highly improbable that Hurren would quit due the lack of interest in the Union on the first day that the Union attempted to openly organize. It is also logically inconsistent with the Union's attempts to handbill employees on May 31.

Respondent argues that Hurren should not be credited because among other things, he "was no neophyte to union organizational drives and activities."[11] It also alleges that his testimony about the threats is the result of coaching by organizer Gekeler. While it is possible that Respondent's assertions are true, I find that it is much more likely that Hurren's account of the events of May 29, are essentially accurate.[12]

Respondent Violated the Act by Telling Employees Orally and in Writing to Report Harassment by Union Adherents to Management

The memo distributed and read to Loudon Steel employees on May 31, is unlawful insofar as it encourages employees to report harassment by union supporters to Respondent. Such documents and instructions have a dual potential. First, they encourage employees to report to Respondent the identity of union card solicitors who in any way approach them in a manner subjectively offensive to the solicited employees. Secondly, they discourage card solicitors in their protected organizational activities.

Loudon's letter and oral presentation could be interpreted by some employees to cover lawful attempts by union supporters to persuade employees to sign union authorization cards. This is particularly true since there is no credible evidence that union supporters employed any unprotected tactics in soliciting support for the Union. Thus, Respondent's letter would tend to restrain union supporters from attempting to persuade any employee to sign an authorization card for fear that they would be reported to management and disciplined, *Arcata Graphics*, 304 NLRB 541, 542 (1991); *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). I therefore find that Respondent violated the Act as alleged in complaint paragraph 13.[13]

Respondent Violated Section 8(a)(1) of the Act on May 29, by Coercively Interrogating Daniel Hurren About his Union Activity, Telling Him That He Could Only Speak to Other Employees at Breaks, Lunch, and Before and After Work, Threatening to Place His Protected Activities Under Surveillance and Doing So, and Threatening Hurren With Physical Harm and Property Damage, as Alleged in Complaint Paragraphs 8 and 9

As I generally credit Hurren's account of his May 29 conversation with Close, I find that Respondent coercively interrogated Hurren by asking him why he supported the Union. This inquiry is coercive in the context of the other things said in the conversation.

Even Close's account, that he told Hurren that he could only talk to employees about the Union at lunch, breaks, and before and after work, constitutes restraint of union activity in violation of Section 8(a)(1). While an employer may prohibit the discussion of non work-related topics during working time, it cannot limit such a prohibition to unions or other protected subjects, *Altorfer Machinery Co.*, 332 NLRB 130, 133 (2000), *M. J. Mechanical Services*, 324 NLRB 812 (1997). There is no evidence that Respondent prohibited employees from discussing non work-related topics. Its employee handbook, GC Exh. 8, contains no such prohibition. Thus, it could not prohibit employees from either encouraging co-workers to support the Union during work time or discouraging co-workers from doing so.[14]

I also credit the testimony of Daniel Hurren and Larry Detgen, and find that Close told Jason Enos, in front of Hurren, that Hurren was to be supervised at all times and that, at Close's direction, Enos kept a constant watch on Hurren. Given that these instructions were given in the context of Close's warnings about not talking about the Union during worktime, I find that Respondent both gave Hurren the impression that his union activities would be under surveillance and in fact, placed his union activities under surveillance.

Respondent, by Emory Close, Engaged in Unlawful Surveillance of Employee's Union Activities by Approaching Employees' Vehicles as the Union Attempted to Distribute Handbills

It is well settled that where, as here, employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful, *Roadway Package System*, 302 NLRB 961 (1991). Thus, Respondent's management personnel did not violate the Act by standing in the parking lot and watching the Union distribute handbills.

However, an employer may not do something "out of the ordinary" to give employees the impression that it is engaging in surveillance of their protected activities, *Arrow Automotive Industries*, 258 NLRB 860 (1981). Emory Close walked up to and within a few feet of 8–10 employees' vehicles when they approached the handbillers. He testified that he did so because his employees could not get into the driveway. I decline to credit this testimony. First of all, the police were at Respondent's plant when the union handbillers were present on May 31. Had the Union been preventing employees from entering the plant, it is reasonable to assume that Respondent would have asked to police to intervene or that the police would have intervened on their own. There is no indication that the police interfered with the distribution of handbills in any way.[15]

[11] Hurren's father is the vice-president of a United Autoworkers Local. Hurren discussed the events of May 29, with his father immediately after getting home that night. His father advised him to call Gekeler.

[12] May 29, 2001, was Hurren's first day back at work after a 3-day suspension for allegedly failing to call in when he took off from work. On May 24, Hurren came to the plant to pick up his paycheck and was asked to leave by Close for allegedly interfering with production. I see no relevance of these facts to the issues in this case.

[13] Respondent would not have violated the Act if it had advised its employees to contact the NLRB in the event of restraint, coercion, or interference with their Section 7 rights on the part of the Union.

[14] While Respondent can certainly take steps to limit conversations that disrupt production, it cannot as a general rule disallow union-related conversations while allowing discussion of other nonwork related subjects.

[15] The police asked the union handbillers to move their cars on May 31, so that trucks could get into the plant (Tr. 65). I assume the handbillers did so and did not otherwise block access to the plant. Other-

Also, given the pretextual nature of Close's explanation for Davis' lay off, I consider his testimony unreliable in the absence of corroboration. There is no corroboration for his assertion that the Union was blocking access to the plant when the 8-10 employees were trying to get to work. Moreover, Davis' testimony, at Tr. 119–120, indicates that the handbillers were not impeding access to the driveway—other than delaying employees a few seconds if they stopped to accept a handbill.

By approaching the employees' vehicles Close was giving the impression that he was determining who was accepting the handbills and thus created the impression of surveillance in violation of Section 8(a)(1).[16] Moreover, there is no alternative and nonviolative reason for Close's conduct during the handbilling.

Respondent's No-Solicitation Rule Violated the Act

Respondent's employee handbook, which was distributed in 1998, contains the following provision

> Solicitation for any cause during working time and in working areas is not permitted. Working time is defined as the time assigned for the performance of your job. Working areas do not include the lunchroom or parking areas. Solicitation during authorized meal and "break" times is permitted as long as it is not conducted in working areas.

GC Exh. 8.

There is no evidence that this rule has been invoked by Respondent with regard to any activity, let alone union activity. The General Counsel alleges that the rule is overly broad and therefore violative of Section 8(a)(1) because it facially prohibits an employee from soliciting in work areas on nonwork time, i.e., during authorized lunches and breaks.

Forty years ago in *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 619 (1962), the Board enunciated differing rules for the distribution of literature and oral solicitations. A rule prohibiting the distribution of literature may properly extend to working areas even during nonworking times, *Albert Einstein Medical Center*, 245 NLRB 140, 142 (1979); *Hale Nani Rehabilitation*, 326 NLRB 335 fn. 2 (1998).

Oral communication regarding union activity can be prohibited during working hours in working areas, only if the employer prohibits oral communication of all subjects during working time, *Altorfer Machinery Co*., 332 NLRB 130 (2000). Since Respondent's no solicitation rule is ambiguous as to whether it applies to oral communications and/or the distribution of literature, the ambiguity must be resolved against *Loudon Steel*, *Grouse Mountain Lodge*, 333 NLRB 1322, 1332 (2001). I therefore find that Respondent's no solicitation rule violates Section 8(a)(1) of the Act because it could be interpreted to prohibit oral communication regarding union activity in working areas at all times, as well as prohibiting oral communications about union activity during working times in which other subjects may be discussed.

CONCLUSIONS OF LAW

A. Respondent, Loudon Steel, Inc., violated Section 8(a)(1) of the Act by

1. Coercively interrogating Donald Davis regarding his union sympathies;

2. Telling employees orally and in writing to report harassment by union adherents to management;

3. Coercively interrogating Daniel Hurren about his union activity;

4. Telling Daniel Hurren that he could only speak to other employees at breaks, lunch, and before and after work;

5. Threatening to place Daniel Hurren's union activities under surveillance and doing so;

6. Threatening Daniel Hurren with physical harm and property damage;

7. Engaging in surveillance of employees' union activities by approaching their vehicles as the Union attempted to distribute handbills; and

8. Promulgating and maintaining a no-solicitation rule that is overbroad due to its ambiguity.

B. Respondent violated Section 8(a)(3) and (1) of the Act by

1. Laying-off Donald Davis on May 31, 2001, and failing to recall him; and

2. Constructively discharging Daniel Hurren on May 29, 2001.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Daniel Hurren and discriminatorily laid off Donald Davis, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Loudon Steel, Inc., Millington, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Sheet Metal Workers International Association, Local 7 or any other union.

wise, I infer the police would have demanded further action by the handbillers.

[16] I conclude that the General Counsel has not established that the presence of about seven management officials and foremen/team leaders in the parking lot was "out of the ordinary."

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Coercively interrogating any employee about union support or union activities.

(c) Giving employees the impression that their protected activities were or would be under surveillance and placing these activities under surveillance.

(d) Threatening employees with physical harm and/or property damage.

(e) Illegally limiting the times and places in which employees may discuss or otherwise orally communicate about union activities and other protected subjects.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Daniel Hurren and Donald Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Daniel Hurren and Donald Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Daniel Hurren and unlawful lay-off of Donald Davis, and within 3 days thereafter notify them in writing that this has been done and that Daniel Hurren's discharge and Donald Davis' lay-off will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Millington, Michigan facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 29, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 2, 2002.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Sheet Metal Workers International Association, Local 7, AFL–CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT place activities protected by Federal labor law under surveillance, nor will we foster the impression that we are doing so.

WE WILL NOT threaten you with physical harm or property damage for engaging in activities protected by Federal labor law.

WE WILL NOT encourage employees or other individuals to report activities that are protected by Federal labor law to us.

WE WILL NOT illegally limit your right to orally communicate with others regarding activities that are protected by Federal labor law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Daniel Hurren and Donald Davis full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Daniel Hurren and Donald Davis whole for any loss of earnings and other benefits resulting from their discharge and lay-off, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Daniel Hurren and the unlawful lay off of Donald Davis, and

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge and lay off will not be used against them in any way.

LOUDON STEEL, INC.